

**Normike Contractors, Inc. and Amalgamated Industrial Union, Local 76B and its Divisions Local 92 and 76, United Furniture Workers of America, AFL-CIO.** Cases 29-CA-6968 and 29-CA-7024

26 August 1983

### DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

On 2 July 1981 the National Labor Relations Board issued its Order in the above-entitled proceeding<sup>1</sup> in which it ordered, *inter alia*, that Respondent make whole certain of its employees for any loss of earnings they suffered as a result of Respondent's unfair labor practices. Thereafter, on 23 March 1982 the United States Court of Appeals for the Second Circuit entered its judgment enforcing in full the Board's Order.<sup>2</sup> A controversy having arisen over the amount of backpay due under the terms of the Board's Order, as enforced by the court, the Regional Director for Region 29, on 31 August 1982 issued and duly served on the parties a backpay specification and notice of hearing alleging the amounts of backpay due the employees under the Board's Order and notifying Respondent that it shall file a timely answer which must comply with the Board's Rules and Regulations, Series 8, as amended. Thereafter, Respondent filed an answer to the backpay specification. Respondent's answer admits only that the 12 named discriminatees alleged as being due backpay were employees of Respondent. Otherwise, in numbered paragraphs not corresponding to the allegations of the specification, Respondent generally denies the allegations of the specification (pars. 1 and 12), denies that the employees sustained any reimbursable pecuniary loss (par. 2), denies that backpay is due to the employees (par. 3), and contends that the discriminatees had interim earnings, while generally denying the interim earnings calculations alleged (pars. 6 and 9). Respondent also generally "objects" to those allegations setting forth the employees' dates of reinstatement and to those allegations describing the gross backpay computation method and the gross backpay calculations (par. 8), and, further, generally asserts that any loss sustained by the discriminatees resulted from their refusals of employment with Respondent and others (par. 7). Respondent, in addition, simply states that discriminatee Guillermo Andrade "was not trust-

worthy in that the said Respondent, upon information and belief, ascertained that said employee had misappropriated property of said Respondent" and that Andrade's "particular work . . . was not continued" (par. 11). Respondent further contends that the strike which occurred was "illegal" and that, from the inception of the strike, Respondent offered and continued to offer "reemployment" to the discriminatees (pars. 4 and 5). Finally, Respondent asserts that it is reserving the right to allege any further statements of fact not alleged in its answer (par. 10).

After receipt of Respondent's answer, a Board agent in Region 29 wrote Respondent a letter, dated 12 October 1982, requesting submission of an amended answer containing specifically described information relating to paragraphs 4-9 and 11 of Respondent's answer. The letter stated that, if no response were received within 7 days of the letter's receipt, it would be assumed that Respondent did not intend to enter a further response. The 12 October letter was sent to Respondent's attorney by certified mail, with return receipt requested and the return receipt shows an 14 October delivery date. Thereafter, by letter dated 4 November 1982, a Region 29 Board attorney advised Respondent's attorney that no amended answer had been received despite repeated requests and an assurance that such amended answer would be received by 3 November 1982; the letter also enclosed a copy of the 12 October letter inasmuch as Respondent's attorney had, according to the letter, advised the Board attorney that he had not seen the 12 October letter.

On 1 December 1982 counsel for the General Counsel filed with the Board a "Motion for Partial Summary Judgment, [and a] Motion To Strike Portions of Respondent's Answer and To Preclude Respondent From Adducing Evidence With Respect to Issues Not Properly Raised," with exhibits attached. In his motions, the General Counsel submits that Respondent has failed: to state the basis for its disagreement with respect to certain matters alleged in the backpay specification, and within its knowledge; to set forth in detail the applicable premises; and to furnish the appropriate supporting figures. The General Counsel also submits that Respondent, in certain paragraphs of its answer, seeks to relitigate matters previously determined in the underlying unfair labor practice proceeding and, in paragraph 10 of its answer, seeks, contrary to the Board's Rules, to gain the privilege of entering the basis for its general denials at some unspecified date. The General Counsel therefore moves that portions of paragraphs 1-5, 7, 8, and 10-12 of Respondent's answer be stricken, except insofar as paragraph 7 refers to willful loss of earnings by re-

<sup>1</sup> The Board's Order was entered *pro forma* in the absence of exceptions to the Administrative Law Judge's Decision; it was not reported in Board volumes.

<sup>2</sup> Enforced, pursuant to an application of the National Labor Relations Board for summary entry of a judgment, in an unpublished order.

fusal of employment with other employers and except insofar as paragraph 10 refers to interim earnings. The General Counsel further seeks partial summary judgment with respect to those paragraphs of the backpay specification to which assertedly no adequate answer has been submitted—paragraph I (the backpay periods), paragraph II (computation of gross backpay), and the appendixes, excluding the portions setting forth the discriminatees' interim earnings—and seeks that Respondent be precluded from adducing evidence with respect to any issues not properly raised in its answer. On 14 December 1982 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motions should not be granted. On 27 December 1982 Respondent filed a response to the Notice To Show Cause opposing the motions.<sup>3</sup> In its response, Respondent reiterates the general denials and assertions of its answer, maintains that some employees did not return when they were invited to return to work, and contends that it ought not be limited to specifications prior to the actual hearing. Respondent also seeks leave to replead its answer should the motions be granted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Partial Summary  
Judgment and Motion To Strike Portions of  
Respondent's Answer and To Preclude  
Respondent From Adducing Evidence With  
Respect to Issues Not Properly Raised**

Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

(b) . . . The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, in-

cluding but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegations, and the respondent shall be precluded from introducing any evidence controverting said allegation.

Our examination of the pleadings herein reveals that, with respect to paragraphs 1-3, 8, 11, and 12 and a portion of paragraph 7 of its answer, Respondent has failed to comply with the requirements of the Board's Rules described above, except insofar as those paragraphs raise the issue of interim earnings and except insofar as paragraph 7 raises the issue of discriminatees' willful loss of earnings in relation to other employers.<sup>4</sup> The general denials in paragraphs 1-3, 8, and 12 do not reveal any basis for disagreement with the backpay specification's allegations, or offer or set forth in detail with supporting figures any alternative premises.<sup>5</sup> The portion of paragraph 7 of the answer which generally asserts that any loss sustained resulted from employees' refusal of employment with Respondent is an inadequate pleading under the Board's Rules in that a refusal of employment with Respondent would clearly be within Respondent's knowledge; however, Respondent has not set forth its position in detail, including which discriminatees would allegedly be affected, when any alleged reinstatement offers were made and when they were rejected, and what effect such conduct would have on the particular discriminatee's backpay entitlement.

<sup>4</sup> The Board has held that a general denial is sufficient to place interim earnings into issue since that information is generally not within Respondent's knowledge. *Dews Construction Corp.*, 246 NLRB 945 (1979).

<sup>5</sup> Further, as counsel the General Counsel points out in his motion, with respect to par. 8 of Respondent's answer, the dates of reinstatement of the discriminatees are set forth, by week ending date, in the Administrative Law Judge's Decision, in the underlying proceeding, as is the date of Respondent's unconditional offer of reinstatement to Andrade. To the extent Respondent may have intended to challenge the reinstatement dates as set forth by the Administrative Law Judge, those dates are *res judicata*.

<sup>3</sup> In its response, Respondent requests oral argument. The General Counsel's motions and accompanying exhibits and Respondent's response adequately present the issues and positions of the parties. Accordingly, we hereby deny Respondent's request.

ment, and Respondent has not provided any supporting figures. Paragraph 11 of the answer is similarly inadequate in that, while Respondent would have knowledge of the alleged circumstances, it fails to set forth its position in sufficient detail, and has failed to provide supporting figures. With respect to paragraph 11, it is particularly noted that Respondent has failed to state, *inter alia*, when discriminatee Andrade allegedly misappropriated Respondent's property and when it obtained knowledge of the alleged act, and has failed to explain, and provide supporting figures of, how such conduct would have affected Andrade's backpay.<sup>6</sup> It is also noted that Respondent fails to assert, with supporting figures, what, if any, impact the alleged discontinuance of Andrade's "particular work" would have had on his backpay. Respondent does not state when Andrade's "particular work" was discontinued and Respondent's statement of work discontinuance does not in itself indicate an impact since there is no accompanying assertion that Andrade would have been laid off or discharged for nondiscriminatory reasons prior to Respondent's reinstatement offer to Andrade and there is no accompanying assertion that substantially equivalent work was not available to Andrade.<sup>7</sup>

Paragraphs 4 and 5 of Respondent's answer—those asserting that the strike was "illegal" and that during the strike Respondent offered reemployment to the discriminatees—concern matters litigated and explicitly determined in the underlying unfair labor practice proceeding.<sup>8</sup> Accordingly, paragraphs 4 and 5 of Respondent's answer are inappropriate pleadings in that they attempt to raise matters now precluded from further litigation by the doctrine of *res judicata*. *Schorr Stern Food Corp.*, 248 NLRB 292, 295 (1980); *American Medical Insurance Co.*, 235 NLRB 1417, 1418-19 (1978); *Brown & Root, Inc.*, 132 NLRB 486, 496 (1961).

<sup>6</sup> We also note that Respondent did make an unconditional offer of reinstatement to Andrade as of 18 April 1979, approximately 2-1/2 months after the 1 February 1979 end of the strike. Accordingly, if Respondent's knowledge of the alleged conduct antedated this offer, by extending the offer, Respondent would have condoned the alleged misconduct. See, e.g., *Princeton Sportswear Corp.*, 220 NLRB 1345, 1346 (1975); *Heath International, Inc.*, 196 NLRB 318, 320, 329 (1972). Further, if Respondent's knowledge of the alleged misconduct postdated the offer, and even assuming that the alleged misconduct was such that Respondent clearly would not have retained Andrade after receipt of the knowledge, backpay would still be appropriate here from the date of discharge until the date of the unconditional offer of reinstatement. See *East Island Swiss Products*, 220 NLRB 175 (1975).

<sup>7</sup> Respondent did not repeat its contention about Andrade's "particular work" being discontinued in its response to the Notice To Show Cause.

<sup>8</sup> The Administrative Law Judge found that the strike, which was preceded by serious unfair labor practices and which was called to protest such practices, was an unfair labor practice strike. The Administrative Law Judge also found that Respondent's requests to employees to return to work throughout the strike did not constitute unconditional offers of reinstatement.

Paragraph 10 of Respondent's answer, which "reserves the right to allege any further statements of facts" not alleged in its answer, on its face raises no substantive admissions or denials in response to the allegations of the specification. It is essentially nothing more than Respondent's position on its procedural pleading "rights" and obligations; however, the assertion of such position accords Respondent no greater "rights" than it would ordinarily have pursuant to the Board's Rules concerning backpay proceedings. Its inclusion in Respondent's answer is therefore surplusage and irrelevant to a determination of the issues raised by the backpay specification, and will accordingly be stricken.<sup>9</sup> In its response to the Notice To Show Cause, Respondent has, additionally, asked leave to replead its contentions, should the General Counsel's motions be granted. While the Board's Rules contain no specific prohibition against amending an answer to a backpay specification in the absence of an amendment to the specification,<sup>10</sup> Section 102.54(a) of the Board's Rules places an affirmative obligation on a respondent to file an answer within 15 days from the service of the specification and Section 102.54(c) explicitly permits the Board to find allegations of a backpay specification to be true and to preclude the introduction of evidence controverting such allegations where an answer fails to comport with the Rules. In view of the authority of the Board to rule on backpay specification allegations without the taking of evidence supporting such allegations, and considering the numerous opportunities Respondent has had to amend its answer to comport with the Board's Rules prior to the issuance of our Order herein, we find it appropriate to now rule on those issues raised in the General Counsel's motions, and we shall deny Respondent's request to replead its answer except as to those issues which Respondent may hereinafter appropriately litigate at the hearing.<sup>11</sup>

<sup>9</sup> If Respondent intended by par. 10 to state that it was without further knowledge in response to the allegations of the specification, such answer would operate as a denial under Sec. 102.54(b) of the Board's Rules. As such a general denial, the paragraph would appropriately be stricken, as requested by the General Counsel, except insofar as it raises the issue of interim earnings.

<sup>10</sup> *Standard Materials, Inc.*, 252 NLRB 679, 680 (1980). However, the Board has found defenses asserted for the first time at a backpay hearing to be improperly raised since they were not specifically pleaded in an answer. *Airports Service Lines*, 231 NLRB 1272 (1977).

<sup>11</sup> By letter of 15 April 1983, addressed to the Regional Director for Region 29, Respondent requested an opportunity to file an amended answer because it had retained new counsel in this matter. By order of 18 May 1983, the Regional Director for Region 29 referred Respondent's request to the Board for decision inasmuch as the proceeding had been transferred to and was pending before the Board. Having carefully considered Respondent's request, we hereby deny it. As discussed above, Respondent has had numerous opportunities to amend its answer to comport with the Board's Rules and has failed to do so, despite explicit requests

*Continued*

Accordingly, we shall grant the General Counsel's motion to strike paragraphs 1-3, 7, 8, and 10-12 of Respondent's answer, except insofar as those pleadings raise the issues of interim earnings and discriminatees' willful loss of earnings with other employers. We shall also grant the General Counsel's motion to strike paragraphs 4 and 5 of Respondent's answer because those paragraphs raise issues not properly litigable in this backpay proceeding. Correspondingly, we shall grant the General Counsel's Motion for Partial Summary Judgment with respect to the allegations in paragraphs I and II and sections "I. Gross Backpay" of each of Appendixes A through L of the backpay specification because Respondent's denials and other answers thereto do not conform to the Board's Rules such that the allegations may be deemed to be true. Further, Respondent shall be precluded from introducing any evidence controverting those allegations which we have found to be true.

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from the Regional Office and advice on additional information appropriate in an amended answer. We note that the only changed circumstance described in the request is retention of new counsel. We also note, moreover, that the request was unaccompanied by any explanation or even indication of in what respect Respondent intended to alter the positions previously taken or to correct its pleadings.

## ORDER

It is hereby ordered that the General Counsel's motion to strike paragraphs 1-5, 7, 8, and 10-12 of Respondent's answer to backpay specifications be, and it hereby is, granted, except insofar as those allegations concern the discriminatees' interim earnings and willful loss of earnings with other employers.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment be, and it hereby is, granted.

IT IS FURTHER ORDERED that the General Counsel's motion to preclude Respondent from adducing evidence be, and it hereby is, granted insofar as it seeks preclusion of evidence controverting those allegations of the backpay specification which we have found to be true.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for the purpose of arranging a hearing before an administrative law judge, limiting such proceeding to a determination of interim earnings, willful loss of earnings with other employers, and net backpay of the discriminatees alleged in the backpay specification, and that the Regional Director be, and her hereby is, authorized to issue notice thereof.